Original
No. 36.

FILED
OCT 1 1901
JAMES H. McKENNEY,
Clerk.

Br. of King for Appellee.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1901.

Filed Oct. 1, 1901.

THE DISTRICT OF COLUMBIA, *Appellant*,

v.

COLUMBUS J. ESLIN, Administrator of DANIEL A. CONNOLLY, deceased,

SAMUEL J. RITCHIE,

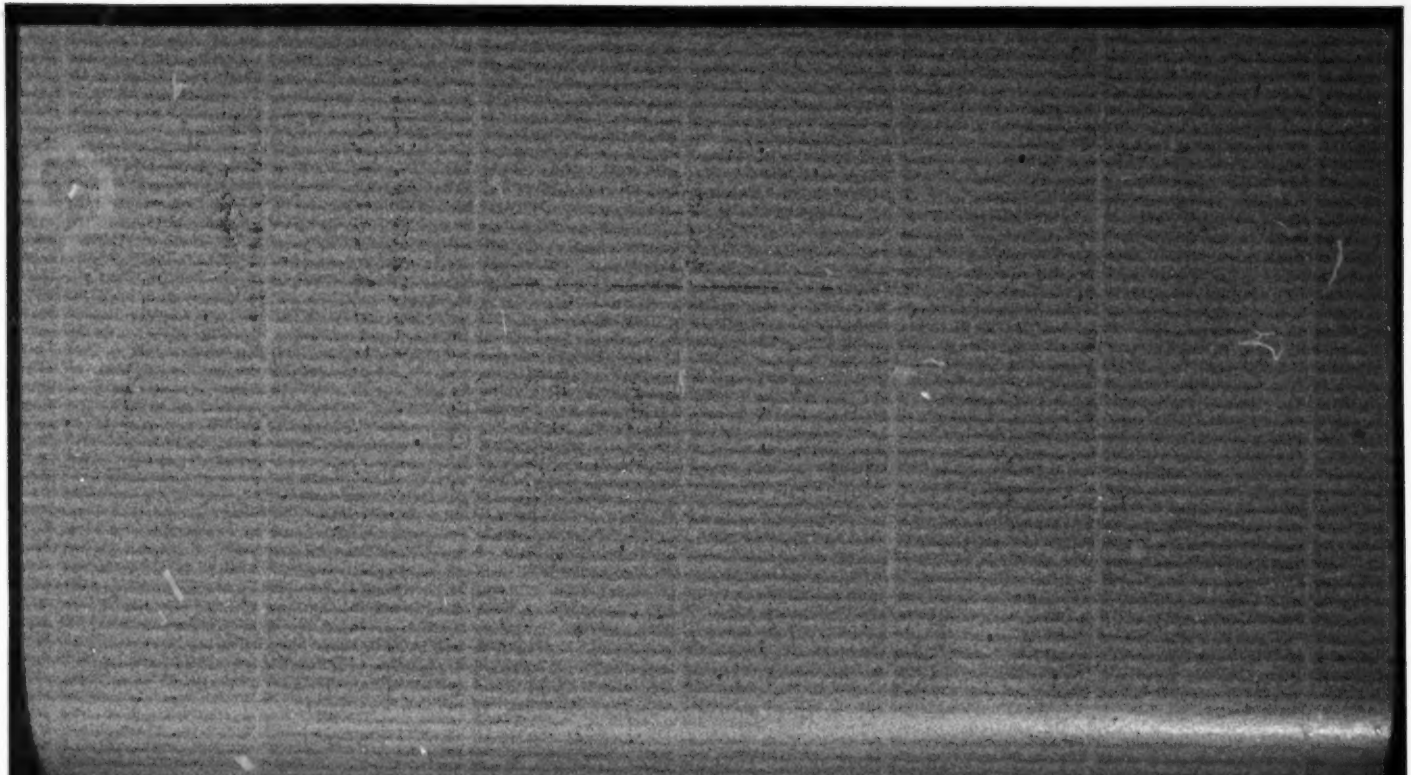
HARRIET T. GALT, Executrix of WILLIAM M. GALT, deceased, and

WILLIAM A. GORDON and J. HOLDSWORTH GORDON, Executors of OSCEOLA C. GREEN, surviving partner of DOWNMAN & GREEN.

No. 36.

Brief of Argument for Columbus J. Eslin, Administrator of Daniel A. Connolly.

WILLIAM B. KING,
Attorney for Appellee.



IN THE

Supreme Court of the United States.

OCTOBER TERM, 1901.

THE DISTRICT OF COLUMBIA, *Appellant*,

v.

COLUMBUS J. ESLIN, Administrator of DANIEL A. CONNOLLY, deceased,

SAMUEL J. RITCHIE,

HARRIET T. GALT, Executrix of WILLIAM M. GALT, deceased, and

WILLIAM A. GORDON and J. HOLDSWORTH GORDON, Executors of OSCEOLA C. GREEN, surviving partner of DOWNMAN & GREEN.

No. 36.

I. Statement of the Case.

The statement of the case contained in the brief of George A. King, Esq., in behalf of Harriet T. Galt, executrix of William M. Galt, deceased, one of the appellees in this cause (pp. 1–12 of said brief), is hereby admitted to be correct and adopted.

In addition to the facts stated in said brief, which include only those material to the claim of said Harriet T. Galt, executrix, the following further facts are material to this cause:

The balances claimed to be due to the present claimant and appellant originated in a large number of written contracts made by Daniel A. Connolly, intestate, of whose estate the present claimant is administrator, with the

District of Columbia for the improvement of the streets of Washington. The facts in regard to that claimed by Harriet T. Galt, executrix of William M. Galt, are fully stated in sub-division 2 of the statement of the case contained in the brief for Harriet T. Galt, executrix (pp. 6, 7). The facts as to the balances on other contracts are as follows, as shown by the findings of the Court of Claims entered May 28, 1894 (pp. 28–46), and the report of the referee of that court, filed about June 22, 1896 (pp. 50–64), which are in harmony with some slight exceptions hereinafter noted:

1. Contracts Nos. 209, 231 and 1035.

As to these three contracts it is found by the court (Finding II, Record, p. 28) that there was due on these three contracts the amount claimed ($244.18). The referee's report shows the amounts as follows:

Contract No. 209	$199 92
" " 231	1 73
" " 1035	42 53
	$244 18

2. Contract 243 and Extensions Thereof.

The contract No. 243 is dated April 24, 1872, and was made with the Board of Public Works. The facts in regard to this contract and its two extensions, so far as they are material to the credits claimed by the defendant, are stated in paragraph A of sub-division 3 of the brief in behalf of Harriet T. Galt (pp. 8–11 thereof).

According to the findings of the court in 1894, if the overpayments alleged to have been made under this contract are credited to the defendant, there will still be due the claimant under this contract and the extensions thereof nine hundred and thirty-six dollars and forty

cents ($936.40). If they are not credited, nine thousand three hundred and forty-nine dollars and ninety-five cents ($9,349.95) will be due, including the two thousand three hundred and twenty-seven dollars and ninety-one cents ($2,327.91) assigned to William M. Galt, and for which his executor has recovered judgment for two thousand and twenty-seven dollars and one cent ($2,027.01) (Record, pp. 34, 35).

A revised finding by the referee (pp. 53–57) shows this balance to be $9,529.95 instead of $9,349.95.

3. Contract No. 349.

The facts as to this contract are set forth in Finding VI (p. 36) and referee's report (pp. 57, 58). Certain alleged overpayments are claimed, consisting of excess of price paid beyond the contract rate on certain items of payment. The finding is that—

"If these alleged overpayments are credited to the defendant there will still be due the claimant $2.51. If not so credited there will be due him $785.56, the amount claimed. Last payment made December 1, 1874."

4. Contracts Nos. 595 and 1057½.

A balance is found due under this contract in favor o the claimant of sixty-six dollars and sixty-five cents ($66.65) (Finding VII, pp. 36, 37; referee's report, pp. 58, 59). It is claimed, however, to be wholly offset and a balance found on the other side by alleged overpayment in excess of contract rates made by authority of the board of audit, and which would show an overpayment of one hundred and seventy-three dollars and thirty-five cents ($173.35).

5. CONTRACT No. 665.

The facts as to this contract are stated in Finding VIII (p. 37) and referee's report (p. 59). There is due under this contract the sum of five hundred and fifty-six dollars and twenty-five cents ($556.25), unless certain claimed overpayments made by authority of the board of audit are allowed as offsets, in which case there would not only be nothing due, but an overpayment to the claimant under this contract will be shown, amounting to one thousand and twelve dollars and thirty-seven cents ($1,012.37).

6. CONTRACT No. 690.

The facts in relation to the preparation and execution of the contract in this case, as set forth in Finding IX (pp. 37, 38) and the referee's report (pp. 60, 61), are quite obscure. The contract, however, as it was finally executed embraces work covering two blocks only, and provided for payment at certain rates for the work on those blocks. As actually done, however, the work covered five blocks. There is still due the contractor the sum of thirty dollars and forty-nine cents ($30.49) on this work. This balance is, however, claimed to be met by certain alleged overpayments. If these alleged overpayments are allowed on that portion of the work which is embraced in the two blocks covered by a different contract, the overpayments would amount to two thousand three hundred dollars and fifty-one cents ($2,300.51). If the contract rates are regarded as covering the whole five blocks, the overpayments would amount to nine thousand and sixty-one dollars and four cents ($9,061.04).

7. CONTRACT No. 828.

"This contract was made August 8, 1874. The work amounted to $1,159.66, of which $300.04 remains due

and unpaid" (Finding X, p. 39; referee's report, pp. 61, 62).

8. CONTRACT No. 1028.

This contract provided for grading on two different streets, and provided a rate of thirty cents a cubic yard for excavating and hauling, not exceeding two hundred feet, and one cent a cubic foot for every additional two hundred feet of haul. It also contained a provision "Grading of old graveled streets, for first ——— feet per cubic yard, ——— cents." There is due this claimant on that contract one thousand nine hundred and forty-five dollars and nine cents ($1,945.09) (Finding XI, p. 39; referee's report, pp. 62, 63). As against this there is a claim for overpayment arising from a payment of forty (40), instead of thirty (30) cents per cubic yard on a portion of the work, making a difference of three hundred dollars ($300). This amount was paid through the board of audit. By its allowance the amount due the claimant would be reduced to one thousand six hundred and forty-five dollars and nine cents ($1,645.09).

Recapitulation.

The following statement shows the amount due according to the findings on each one of the contracts upon which a balance is claimed in this case, without reference to the alleged overpayments or set-offs:

	Findings of Court, 1894.	Report of Referee, 1896.
1. Contracts Nos. 209, 231 and 1035	$244 18	$244 18
2. Contract No. 243 and its two extensions	9,349 95	9,529 95
3. Contract No. 349	785 56	785 68
4. Contracts Nos. 595 and 1057½	66 65	66 65
5. Contract No. 665	556 25	556 25
6. Contract No. 690	30 49	30 49
7. Contract No. 828	300 04	300 04
8. Contract No. 1028	1,945 09	1,945 09
Total	$13,278 21	$13,458 33

The difference between the findings of the court and the report of the referee is only $180.12, and arises (save as to 12 cents difference on Contract 349) out of a recomputation on Contract No. 243 and its extensions.

Orders of Board of Public Works.

Some of the overpayments claimed on behalf of the District of Columbia arise from the execution of orders made by the Board of Public Works and entered upon its journal, set forth in Finding III (pp. 28–30), and which may be summarized as follows:

1871.

Sept. 14, order allowing for "Grading per cubic yard, earth to be deposited where directed without extra charge, 20 cents."

Sept. 26, order providing that the preceding order was not intended to apply to old graveled streets ordered to be cut down, but that forty cents should be allowed for all such grading for the depth of two feet below the surface.

1872.

Jan. 22, order fixing the price of grading at thirty cents per cubic yard, including hauling, not to exceed two hundred feet, and for each additional two hundred feet, one cent per cubic yard.

July 17, order that the advanced rates of the preceding order should apply only on new contracts, and the old rates should be adhered to on contracts made prior to the order increasing prices.

1873.

July 15, price for hauling earth established at one and one-fourth cents per cubic yard for every foot of haul over first two hundred feet since June 1, 1873.

Sept. 23, the auditor of the Board of Public Works calls attention to the fact that contractors ask for an allowance of one and one-fourth cents per yard for every yard hauled one hundred feet more than two hundred feet, on the ground that they have to stand a discount of twenty per cent. on their paper.

Sept. 27, the Board of Public Works notifies the auditor in response that in the settlement of such accounts one and one-fourth cents per cubic yard for each additional one hundred feet beyond the first two hundred feet for all work done since January 1, 1873, will be allowed.

II. BRIEF.

History of the Case.

The claim of Daniel A. Connolly against the District of Columbia is of long standing. It arises out of contracts made with the late Board of Public Works of the District of Columbia, and in a few instances with their successors in office, the Commissioners of the District, in the years 1872, 1873, 1874 and 1875. The present claim has been in course of prosecution by the administrator of Connolly and three different assignees in the Court of Claims for twenty years. After a number of hearings, in which various and sometimes conflicting results were arrived at, the Court of Claims finally on the 22d of June, 1896, rendered the judgments from which this appeal was taken.

By these judgments it allowed to Columbus J. Eslin, administrator of Daniel A. Connolly, the sum of four thousand eight hundred and forty-one dollars and twenty-six cents ($4,841.26); to Harriet T. Galt, as executrix of William M. Galt, two thousand and

twenty-seven dollars and one cent ($2,027.01) and William A. Gordon and J. Holdsworth Gordon, executors of Osceola C. Green, surviving partner of Downman & Green, one thousand two hundred and fifty dollars and seventy-six cents ($1,250.76); and to Samuel J. Ritchie five thousand three hundred and thirty-nine dollars and thirty cents ($5,339.30), amounting in all to thirteen thousand four hundred and fifty-eight dollars and thirty-three cents ($13,458.33), upon debts of the District of Columbia, due and payable February 1, 1876 (Transcript of Record, p. 66).

In its judgment the court professed to base this action upon the act of February 13, 1895 (28 Stat. L. 664), by which it was provided that "The Court of Claims shall allow the rates established and paid by the Board of Public Works."

Subsequently, however, Congress, by the act of March 3, 1897 (29 Stat. L. 669), repealed the act of February 13, 1895.

After the passage of the latter act a motion for new trial came on to be heard before the Court of Claims, who, after hearing the same, on the 15th of January, 1900, overruled the motion (p. 68).

By this action the judgments rendered June 22, 1896, were in effect held to be good and valid judgments against the District of Columbia under the act of June 16, 1880 (21 Stat. L. 284), which originally conferred jurisdiction of this class of cases upon the Court of Claims.

That this position is well founded, and that the judgment in question, so far as it awards to the claimant, Columbus J. Eslin, as assignee of the deceased contractor, Daniel A. Connolly, the sum of four thousand eight hundred and forty-one dollars and twenty-six cents ($4,841.26) is correct will be the object of this brief to show.

The Issues.

It can not be denied that every item which goes to make up the total set forth in the recapitulation of the findings of the Court of Claims contained in this brief, *ante*, p. 5, is reached by allowing the representatives of the contractor no more than the rates specified in the original contracts between him and the District of Columbia.

The only question is, whether the District of Columbia should be permitted to recover back as overpayments sums paid with full knowledge of the facts, and either (as in the case of Contract 243) through the action of a fair and impartial commission, or (as in the case of nearly all the other contracts) through the Board of Audit, a quasi-judicial body.

First Judgment of the Court of Claims.

The result at which the Court of Claims arrived on the first trial of this case will be found stated in its opinion (Record, p. 20). The computation there made results in finding a balance in favor of the District of Columbia of $658.05. The fallacy of the process by which this result was reached is demonstrated in the brief already filed on behalf of Harriet T. Galt, executrix of William M. Galt, and was, in effect, admitted by the court by its order (p. 27) granting a new trial, as well as by its opinion (pp. 46–48) on the new trial.

A computation is given on page 18 of the Galt brief which results in a balance in favor of Connolly of $4,904.98. This result, however, is only reached by the allowance of every possible credit in favor of the District of Columbia. Such, of course, was all that was necessary in the argument of the Galt case.

The entire amount claimed by Galt in his original petition (Transcript of Record, pp. 6–9) and found due him by the findings of the court (p. 35) was only

$2,327.91. Hence it was not incumbent upon counsel for his executrix to do any more than show a sufficient amount due from the District to Connolly to meet that particular indebtedness. This was especially true in view of the stipulation among the parties for distribution of the sum found due, whereby it was agreed among them (p. 64) that the Galt claim was in no event to be reduced below the sum of two thousand dollars.

Overpayment Claimed on Contract 243.

The item of alleged overpayment (p. 33 of Transcript of Record), amounting to $2,850.52, ought not to be deducted from the amount otherwise due on this contract.

It is found by the Court of Claims (Transcript of Record, p. 33):

"A controversy having arisen between Connolly and the Board of Public Works in respect of the amount of work done under the original contract No. 243, the matter was referred, on November 20, 1873, for adjudication to a commission consisting of S. T. G. Morsell, Thomas M. Plowman, Joseph F. Collins, and W. P. Bell, and a settlement of the account under said original contract was made in accordance with the award of said commission, as reported by that body to the Board of Public Works November 27, 1873."

It is true that the court adds in immediate sequence, "There is no sufficient evidence to support this statement of the referee." A reference to the opinion of the court (p. 47), however, shows that the Court of Claims had no doubt as to the facts submitted to the commission in question, but held adversely to the validity of their action in the allowance of board rates instead of contract rates.

The court says in its opinion (p. 47):

"There is no dispute in this matter as to the amount of work done. The point is that Connolly was allowed

board of works rates instead of his contract rates in this payment. We do not consider that the referee's report (and we have no other evidence) shows a submission to an arbitration which could produce an award binding and conclusive upon the District, or that the decision of these commissioners effected such a settlement as amounts in law to an accord and satisfaction. On the contrary, this report, in our opinion, simply shows a payment made upon the statement of adjusters, appointed in the course of business, prepared upon the assumption that Connolly should be allowed board rates and not contract rates, an assumption held by this court to be unwarranted."

It thus appears by the opinion of the Court of Claims,—

1. That there is not now any dispute as to the amount of work done and that the contractor was paid for that amount and for no more.

2. That the question of how much work he did as well as how much he should be paid for it was submitted to a commission or board of arbitration, who reported not only what amount of work he had done, but what sum he should be paid for it.

3. That he was paid that sum and received it in satisfaction of that amount of work done.

This court has repeatedly sustained the validity and finality of payments made or new contracts entered into in settlement of disputed rights under an original contract. *United States* v. *Clyde*, 13 Wall. 35; *Mason* v. *United States*, 17 Wall. 67; *Sweeny* v. *United States*, 17 Wall. 75; *Silliman* v. *United States*, 101 U. S. 465. According to these decisions, there is no warrant for the attempt of learned counsel for the District to disturb the validity of the payment made under the award of this commission, or to demand that such payment be set off against sums found due for other work on either this or different contracts.

The views of this court on the subject of voluntary payments have recently been given in the case of *United States* v. *Edmondston*, 181 U. S. 500. It is held in that case that where money is voluntarily paid to the government without objection or protest, it can not be recovered back even though the law would not have obliged the party to pay it.

The same principle applies with very great force to the case of a contract with the District of Columbia for public improvements, and especially where the amount paid was not only no more than a fair and reasonable price for the work, but where it was paid by authority of an award of a fair and honest commission.

Suppose the case reversed and the commission had allowed less than contract rates. Would the contractor have been heard afterwards to say that his work was really worth more or that the contract entitled him to more? Clearly not, as is shown by repeated decisions of this court. Yet the District of Columbia and the contractor in this instance stood on exactly the same footing. This court decided in the case of *Metropolitan R. R.* v. *District of Columbia*, 135 U. S. 1, that the District of Columbia is, in general, subject to the same rules as are individuals. Every one of the cases cited to the contrary of this proposition in the brief of the appellant (p. 21) is a United States case, and prerogatives of sovereignty applied in those cases as they can not apply in the case at bar, which pertains only to a municipal corporation.

Overpayments through Board of Audit.

For the same reason the alleged overpayments to Connolly on Contracts Nos. 595, 1057½, 665 and 690, which are summarized on page 18 of the Galt brief and amount to $3,486.23, can not be sustained as the basis of counterclaim. The payments made on all but the last of these

contracts are found by the Court of Claims (Findings VII and VIII, pp. 36, 37) to have been made through the Board of Audit. These were deliberately made through an accounting body which, even if not strictly judicial, was appointed by the law to determine these very questions (Act June 20, 1874, § 6, 18 Stat. L. 118–120). The law made payments to a contractor through this board of audit conclusive. "No claim shall be presented to or considered by the Court of Claims under the provisions of this act which was rejected by the Board of Audit" (Act June 16, 1880, § 8, 21 Stat. L. 286).

Common fairness requires the application of the converse principle,—that a payment once made through the Board of Audit shall be regarded as a finality.

Overpayments on Contract 690.

The alleged overpayment on Contract No. 690 presents, if possible, even less equity in favor of the District. A contract was made for doing work on two blocks on First street east. The work was in fact done on five blocks, embracing the two named in the contract and three others. All were paid for at the rates established and paid by the Board of Public Works. "Under what arrangements this additional work was done does not appear" (Record, p. 38). In the absence of any further finding as to a contract for the additional three blocks and in view of the fact that the rates established and paid by the Board of Public Works and commonly known as "board rates," were in fact paid for the whole five blocks, the only possible explanation of the transaction is that it was part of the consideration for doing the additional three blocks, that the whole five, including the two named in the original contract, should be paid for at board rates.

There was nothing immoral or unfair about such an arrangement and we submit there was nothing illegal about it.

To raise the rates above those named in the original contract without any new consideration may not have been within the powers of the Board of Public Works; but to raise those rates upon a new and valuable consideration was entirely within their powers.

It is not inconsistent, indeed, with the findings of the Court of Claims, to suppose that some new and formal contract was entered into embodying just such an arrangement as we have suggested to be the one that probably was made. We need not go as far as this to explain the arrangement. It is quite enough to sustain its validity if it be shown, as the findings do show, that under some arrangement the whole five blocks were done at a uniform price; and it matters not that as to two of those blocks, the price was somewhat higher than specified in the original contract.

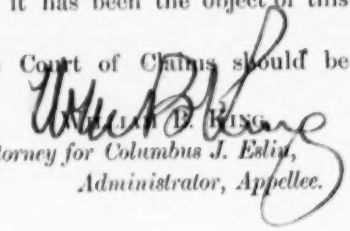
There should, therefore, be no deduction on account of alleged overpayments on any of the contracts.

Conclusion.

Having now discussed the questions of detail arising in this cause, we submit that the recent decision of this court in *District of Columbia* v. *Tally*, 182 U. S. 510, is conclusive in favor of this judgment as a whole. The report of a referee appointed and acting in pursuance of the District Claims Act, is there treated as *prima facie* correct. Having been made the basis of a judgment of the Court of Claims, it will be presumed to be correct until errors in it are made to appear. That there are no

such errors in the referee's report, or in the action of the Court of Claims thereon, it has been the object of this brief to show.

The judgment of the Court of Claims should be affirmed.



WILLIAM B. KING,
Attorney for Columbus J. Eslin,
Administrator, Appellee.